

**Iowa Department of Natural Resources
Environmental Protection Commission**

ITEM

5

DECISION

TOPIC

**Appeal of Declaratory Order
Filed by the S. Martinelli & Company
RE: 567 IAC 107.2 – Determination of whether carbonated fruit juice is
subject to the Iowa Bottle Deposit Law.**

On August 15, 2008, S. Martinelli & Company filed a request for a declaratory order stating that carbonated fruit juice is exempt from the Iowa bottle deposit law.

On September 8, 2008, the Department issued Declaratory Order No. 2008-DO-01 finding that carbonated fruit juice meets the definition of soft drink found at 567 IAC 107.2 and is therefore subject to the Iowa bottle deposit law. Rule 567 IAC 107.2 states that “soft drink” means any nonalcoholic liquid other than mineral water or soda water intended for human consumption. Pursuant to section 455C.1(1), the Iowa bottle deposit law applies to carbonated soft drinks.

On September 24, 2008, S. Martinelli & Company filed an appeal of Declaratory Order No. 2008-DO-01. The Commission shall review the Declaratory Order and affirm, reverse, or modify the determination of the Director.

Jon C. Tack
Legal Services Bureau
November 11, 2008



SINCE 1868

S. MARTINELLI & COMPANY

P.O. BOX 1868

WATSONVILLE, CALIFORNIA 95077

(831) 724-1126

September 24, 2008

Lisa Nissen
Iowa Environmental Protection Commission
Iowa Department of Natural Resources
502 E. 9th St.
Des Moines, IA 50319-0034

Re: Notice of Appeal of DNR declaratory order No. 2008-DO-O1

Dear Ms Nissen and members of the Iowa EPC:

We are hereby appealing the decision of the Iowa DNR to include our sparkling 100% fruit juices under the Iowa bottle deposit law. The ruling of the Director attempts to make the case that a carbonated 100% fruit juice is a soft drink and therefore subject to the act. The Director states that the enclosed 1983 Declaratory Ruling of the New York State DEC is not relevant in this case, yet this ruling makes the clear case exactly why it is incorrect to classify a 100% fruit juice as a soft drink by Federal law.

The Director states that "fruit juice is a nonalcoholic liquid and therefore meets the definition of "soft drink." This is a drastic over simplification of the facts that ignores the clear legal definitions that differentiate soft drinks from juice. Soda water and soft drinks, like Coke and Pepsi, have a federal identity standard that is defined by the FDA to be a fabricated drink made from water, artificial flavorings, sweeteners and coloring. Our carbonated 100% fruit juices contain none of these ingredients.

The Iowa beverage definition defines beverage to include "soda water and similar carbonated soft drinks." In order for fruit juice to be defined as a soft drink, it would have to be "similar" to soda water. Fruit juice is the liquid extracted from fruit and is therefore not similar to soda water which is made from water and artificial ingredients. The lack of similarity is further demonstrated by the fact that soft drinks are subject to sales tax, and fruit juices are non-taxable food products.

Fruit juice is not included in any of the various beverage definitions of products that were intended by the Iowa legislature to be included in the bottle deposit law. Therefore, fruit juices are not required to comply with this law. Carbonation does not dilute fruit juice and our sparkling juice is classified by the FDA as a 100% fruit juice. Therefore, carbonated fruit juice should also not be included in this law.

The Director states that "the rules which govern statutory interpretation are well established ...and the court should not search for a meaning beyond the express terms of the statute." Ironically, I believe the Director is "searching for a meaning beyond the express terms" by ignoring the clear definitional differences between these product classifications that Federal law has established.

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The legislature's clear intent was to exclude fruit juices from this law by not including them in the beverage definition. A subsequent attempt in 2004, failed to expand the beverage definition to include water, tea and juice, which further demonstrates the original legislature's intent to limit the scope of the bottle deposit law to the traditional beverage definition adopted by many eastern states. Likewise, the fact that juice is specifically listed in that effort to expand the beverage definition proves that juice is not included in the original definition.

We support the concept of recycling and comply with the various states that specifically list juice in their beverage definition like California, Hawaii and Maine. Our sparkling juice is sold in the juice aisle in grocery stores and not in the soft drink section. It is critical that our sparkling products be priced competitively and not subject to a deposit that is not applied to the other products in the juice category.

Becoming subject to the Iowa deposit law with the traditional soft drink beverage definition would also create a damaging precedent that could result in our forced inclusion in the many other eastern states that have similarly crafted laws.

Since our products are all made in California from 100% US Grown fresh apples, we have a much higher cost of raw materials and a large freight expense shipping across the country. This makes it very difficult to compete with nearly every other juice brand that is made from low cost concentrate imported primarily from China. Our consumers should not be expected to pay an even higher price for our sparkling juices simply because they are carbonated when that is the only difference between exempted fruit juice items and our sparkling juices.

Thank you for your consideration.

Sincerely,



S. John Martinelli
President

IOWA DEPARTMENT OF NATURAL RESOURCES

Petitioned by: S.MARTINELLI & COMPANY For a Declaratory Order on: Iowa Administrative Code section: 567-107.2(455C)	DECLARATORY ORDER No. 2008-DO-01
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TO: S. John Martinelli
Martinelli & Company
PO box 1868
Watsonville, CA 95077

I. PROCEDURE

On August 18, 2008, S. Martinelli & Company filed a Petition for Declaratory Order pursuant to section 17A.9 of the Code of Iowa and 561 Iowa Administrative Code (IAC) Chapter 6. The Petition requests a Declaratory Order from the Iowa Department of Natural Resources (Department) stating that carbonated fruit juice is exempt from the Iowa bottle deposit law (Chapter 455C of the Code of Iowa and IAC Chapter 567--107.) A Declaratory Order is hereby issued within 30 days as required by Section 17A.9 of the Code of Iowa and 561 IAC Chapter 6.

Pursuant to 561 IAC 6.12, a declaratory order has the same status and binding effect as a final order issued in a contested case proceeding. It is binding on the Department, the petitioner, and any intervenors (who consent to be bound) and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the Department. The issuance of a declaratory order constitutes final agency action, subject to the right to appeal said order to the Environmental Protection Commission.

IOWA DEPARTMENT OF NATURAL RESOURCES
DECLARATORY ORDER
S. Martinelli & Company

II. RULING OF THE DIRECTOR

The Department hereby makes the following ruling and findings related to the issues raised in the Petition for Declaratory Order.

Question presented: *Is carbonated fruit juice exempt from the Iowa bottle deposit law?*

Response: As set out in section 455C.2 of the Code of Iowa, "[a] refund value of not less than five cents shall be paid by the consumer on each beverage container sold in this state by a dealer for consumption off the premises." Pursuant to section 455C.1(1) of the Code of Iowa, "beverage" means wine as defined in section 123.3, subsection 37, alcoholic liquor as defined in section 123.3, subsection 5, beer as defined in section 123.3, subsection 7, mineral water, soda water and similar carbonated soft drinks in liquid form and intended for human consumption.

Pursuant to section 455C.9 of the Code of Iowa, the Iowa Environmental Protection Commission has adopted IAC Chapter 567-107 to carry out the provisions of Chapter 455C of the Code of Iowa. Rule 567 IAC 107.2 states that "soft drink" means any nonalcoholic liquid other than mineral water or soda water intended for human consumption. Neither the Department nor the Petition assert that carbonated fruit juices are mineral water or soda water so that issue is not addressed herein. Both mineral water and soda water are subject to Iowa's bottle deposit law.

The question then raised is whether carbonated fruit juice is a carbonated soft drink for purposes of Iowa law. The rules which govern statutory interpretation are well established in Iowa. "When the text of a statute is plain and its meaning clear, the court should not search for a meaning beyond the express terms of the statute...." *State v. Schultz*, 604 N.W.2d 60, 62 (Iowa 1999) (internal citations omitted). A law which regulates conduct for the public good or welfare is ordinarily remedial and liberally interpreted. *First Iowa State Bank v. Iowa Dept. of Natural Resources*, 502 N.W.2d 164, 166 (Iowa 1993).

Fruit juice is a nonalcoholic liquid and therefore meets the definition of "soft drink" at 567 IAC 107.2 if intended for human consumption. Carbonated soft drinks are subject to the provisions of Chapter 455C of the Code of Iowa. The Petitioner specifically requests a ruling of the Department in regard to carbonated fruit juice.

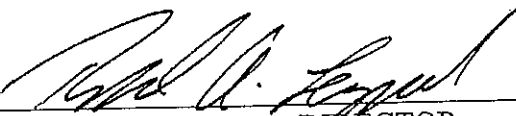
To the extent carbonated fruit juice is intended for human consumption it is subject to the requirements of Chapter 455C of the Code of Iowa and IAC Chapter 567-107.

The Petitioner has provided a 1983 Declaratory Ruling of the New York State Department of Environmental Conservation in support of this Petition. This ruling is based upon a finding that fruit juice is not a soft drink pursuant to New York law. In light of the clear definition of soft drink found at 567 IAC 107.2, this New York Declaratory Ruling is not relevant to the determination of the issue presented herein.

IOWA DEPARTMENT OF NATURAL RESOURCES
DECLARATORY ORDER
S. Martinelli & Company

III. APPEAL RIGHTS

Pursuant to 561 IAC 6.7 a written Notice of Appeal to the Environmental Protection Commission may be filed within 10 days of receipt of this Declaratory Order. The Commission may also review the Declaratory Order upon its own motion.



RICHARD A. LEOPOLD, DIRECTOR
IOWA DEPARTMENT OF NATURAL RESOURCES

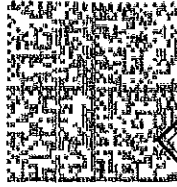
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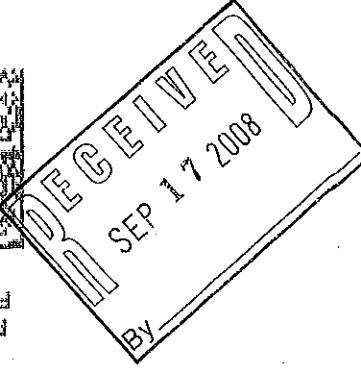
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P.O. BOX 1868

WATSONVILLE, CALIFORNIA 95077

(831) 724-1126

August 15, 2008

Richard Leopold
Director of the Iowa Department of Natural Resources
502 E. 9th Street
Des Moines, IA 50319-0034

Dear Mr. Leopold:

We have recently become aware that our sparkling 100% apple cider may be expected to comply with Iowa's bottle deposit law. We respectfully request a declaratory ruling which specifically states that carbonated fruit juice is exempt from the Iowa bottle deposit law. Fruit juice was not originally intended to be included by the legislature and subsequent attempts to expand the beverage definition is proof that fruit juice is not included in the beverage definition at this time.

The beverage definition in Iowa code 567-107.2(455C) clearly defines beverage to include "soda water and similar carbonated soft drinks." "Soft drink" is defined as "any nonalcoholic liquid other than mineral or soda water" yet there does not appear to be any mention of 100% fruit juice in this beverage definition. Therefore, it is our understanding that 100% fruit juice is specifically exempt from these regulations.

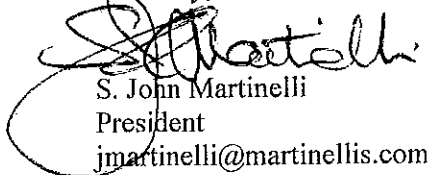
"Soda water is further defined as "water that has been carbonated." Our sparkling cider does not contain any water. Carbon dioxide, naturally absorbed in fruit juice, does not dilute the juice and therefore does not make it become a soda or soft drink- which is made from water and flavorings- neither of which is in our product. Tax law further distinguishes between soft drinks and fruit juices by exempting fruit juices from sales tax because they are nutritious food products.

Twenty-five years ago we received the enclosed declaratory ruling from the State of New York, which shares the same beverage definition, scope and intent of the bottle bill as the state of Iowa and most other states. New York's ruling specifically exempts our sparkling 100% juices from required compliance with their law. This ruling is a long established legal precedent and has the same basis for which a similar finding would be made in any similarly crafted law. As a result, our sparkling cider is also exempt from the bottle deposit regulations in Connecticut, Delaware, Massachusetts, Vermont and Oregon.

Please consider the attached declaratory ruling from the State of New York as legal precedent in establishing the proper definition for a beverage covered under the bottle deposit law in Iowa, as it is in the other states listed above.

S. Martinelli & Company is a fourth generation family owned producer of 100% fruit juice products, established in California in 1868. More detailed information about our company and its products can be found on our web site. www.martinellis.com

Sincerely,



S. John Martinelli
President
jmartinelli@martinellis.com

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CHAPTER 107
BEVERAGE CONTAINER DEPOSITS

[Prior to 7/1/83, DEQ Ch 34]
[Prior to 12/3/86, Water, Air and Waste Management[900]]

567—107.1(455C) Scope. This chapter is intended to implement the provisions of Iowa Code chapter 455C. The Act requires that every alcoholic liquor container, beer, mineral water, soda water or carbonated soft drink container sold in Iowa for consumption off the premises of the dealer be subject to a deposit of 5 cents or more. Such container must have indicated on it that the container is subject to a minimum refund of 5 cents or must be exempt from the requirement of having the refund value indicated on it. An empty container on which an Iowa deposit was made may be returned to any dealer in the state who sells the kind, brand and size of container or may be returned to a redemption center. The dealer or redemption center must accept the empty container and refund the deposit.

Iowa Code section 455C.2(2) provides in part: "A dealer, dealer agent, or person operating a redemption center may compact empty metal beverage containers with the approval of the distributor required to accept the containers." So far as metal beverage containers are concerned, such right of approval by the distributor would be meaningless if the dealer were required to accept and redeem crushed metal beverage containers from consumers. Since there appears to be no reason to treat distributors of nonrefillable glass beverage containers differently from distributors of metal beverage containers, there is presumably a corresponding right for the distributors of nonrefillable glass beverage containers to approve the destruction of the containers.

The Act also prohibits the sale at retail of any metal beverage container so designed and constructed that a part of the container is detachable in opening, the so-called "pop-top can."

This chapter contains rules specifying the minimum size of type to be used for indicating the minimum refund value on beverage containers, rules relating to approval of redemption centers for beverage containers and rules relating to exemptions from labeling the refund value on beverage containers. This chapter also contains interpretive rules that clarify or interpret the statute or apply the statute to specific factual situations.

567—107.2(455C) Definitions. As used in this chapter:

"Act" means Iowa Code chapter 455C.

"Alcoholic beverage" means any beverage containing more than one-half of 1 percent of alcohol by volume including alcoholic liquor, wine, and beer.

"Alcoholic liquor" or "intoxicating liquor" means the varieties of liquor defined hereunder in paragraphs 1 and 2 which contain more than 5 percent of alcohol by weight, beverages made as described in the definition of "beer" which beverages contain more than 5 percent of alcohol by weight but which are not wine as defined in this rule, and every other liquid or solid, patented or not, containing spirits and every beverage obtained by the process described in the definition of "wine" containing more than 17 percent alcohol by weight, and susceptible of being consumed by a human being, for beverage purposes.

1. "Alcohol" means the product of distillation of any fermented liquor rectified one or more times, whatever may be the origin thereof, and includes synthetic ethyl alcohol.

2. "Spirits" means any beverage which contains alcohol obtained by distillation mixed with drinkable water and other substances in solution, including, but not limited to, brandy, rum, whiskey, and gin.

3. Rescinded effective July 1, 1985.

"Approved redemption center" means a redemption center approved by the department pursuant to 107.4(1).

"Beer" means any liquid capable of being used for beverage purposes made by the fermentation of an infusion in potable water of barley, malt, and hops, with or without unmalted grains or decorticated and degerminated grains or made by the fermentation of or by distillation of the fermented products of fruit, fruit extracts, or other agricultural products, containing more than one-half of 1 percent of alcohol by volume but not more than 5 percent of alcohol by weight but not including mixed drinks or cocktails mixed on the premises.

"Beverage" means wine as defined in Iowa Code section 123.3, subsection 7, alcoholic liquor as defined in Iowa Code section 123.3, subsection 8, beer as defined in Iowa Code section 123.3, subsection 9, mineral water, soda water or similar carbonated soft drinks in liquid form intended for human consumption.

"Beverage container" means any sealed glass, plastic, or metal bottle, can, jar or carton containing a beverage.

"Carbonated" means charged under pressure with carbon dioxide.

"Commission" means the environmental protection commission of the department of natural resources.

"Consumer" means any person who purchases a beverage in a beverage container for use or consumption.

"Dealer" means any person who engages in the sale of beverages in beverage containers to a consumer.

"Dealer agent" means a person who solicits or picks up empty beverage containers from a dealer for the purpose of returning the empty beverage containers to a distributor or manufacturer.

"Department" means the department of natural resources.

"Director" means the director of the department of natural resources.

"Distributor" means any person who engages in the sale of beverages in beverage containers to a dealer in this state, including any manufacturer who engages in such sales.

"Emboss" means to raise the surface in relief.

"Exempt beverage container" means a beverage container that is not marked with the words "Iowa Refund 5¢" because it is a refillable glass beverage container having a brand name permanently marked on it and having a refund value of 5 or more cents or because it is a refillable metal or plastic beverage container that has been exempted, in accordance with the procedure of 107.3(7), from the requirement of having the refund value marked on the container. An exempt beverage container is exempt from having the words "Iowa Refund 5¢" indicated on the container, but is not necessarily exempt from the minimum deposit.

"Exempt dealer" means a dealer named in a department order that approves a redemption center pursuant to 107.4(1).

"High-contrasting color" in reference to labeling requirements means a clear differentiation in hue, value, and intensity with the background on which the redemption message appears, surrounding artwork, and other nearby printed information.

"Incise" means to scratch the surface to produce legible letters or characters at a precise width and depth.

"Indelibly" means that the refund value is permanently affixed on the beverage container and cannot be smeared or removed during regular use from the point of being offered for sale until the point of redemption.

"Manufacturer" means any person who bottles, cans, or otherwise fills beverage containers for sale to distributors or dealers.

"Mineral water" means water naturally or artificially infused with mineral salts or gases. Mineral water may be carbonated or uncarbonated.

"Redemption center" means any establishment other than a dealer's premises at which consumers may return empty beverage containers and receive payment of the refund value of the containers, or means the premises of a dealer if the dealer voluntarily chooses to accept, and refund the deposit on, empty beverage containers (other than alcoholic liquor containers) that are not of the kind, size and brand sold by the dealer. A redemption center is either an approved redemption center or an unapproved redemption center.

"Redemption center for a dealer" means a redemption center that provides beverage container sorting and handling services for a dealer and that has been certified by the department pursuant to 107.4(3).

"Registered redemption center" means a redemption center registered with the department pursuant to 107.4(4).

"Soda water" means water that has been carbonated.

"Soft drink" means any nonalcoholic liquid other than mineral water or soda water intended for human consumption.

"Unapproved redemption center" means a redemption center that is not an approved redemption center or a registered redemption center.

"Wine" means any beverage containing more than 5 percent but not more than 17 percent alcohol by weight obtained by the fermentation of the natural sugar contents of fruits or other agricultural products but excluding any product containing alcohol derived from malt or by the distillation process from grain, cereal, molasses, or cactus.

This rule is intended to implement Iowa Code sections 455C.1 and 455C.9.

567—107.3(455C) Labeling requirements.

107.3(1) All beer, wine, alcoholic liquor, mineral water, soda water and similar carbonated soft drink containers (other than exempt containers) sold or offered for sale in Iowa by a dealer shall have the words "Iowa Refund 5¢" or "IA 5¢" clearly, indelibly and legibly indicated on the container. If the refund value is more than 5 cents, the greater value may be indicated, e.g., "Iowa Refund 10¢" or "IA 10¢." Any abbreviation of the words "Iowa Refund" other than as provided in this subrule shall be submitted to and approved by the department.

107.3(2) The minimum size of the words "Iowa Refund 5¢" or "IA 5¢" and all approved abbreviations shall be a minimum of 9-point type (approximately .125 inch or 3 millimeters) if the words are embossed or incised and 18-point type (approximately .25 inch or 6 millimeters) if the words are otherwise affixed to the container. A stamp or label may have the words "Iowa Refund 5¢" or "IA 5¢" in less than 18-point type if the label is submitted to the department and the department determines that the high-contrasting color or the characteristics of the stamp or label make the stamp or label as easy to discern as a stamp or label with 18-point type.

107.3(3) The words "Iowa Refund 5¢" or "IA 5¢" shall be indicated by embossing (raised letters), by incising, by printing in high-contrasting color, by a stamp or label of high-contrasting color, or other method approved by the department securely and permanently affixed to the container.

107.3(4) Rescinded IAB 4/17/02, effective 5/22/02.

107.3(5) The words "Iowa Refund 5¢" or "IA 5¢" shall be on the top of a metal beverage container. The words "Iowa Refund 5¢" or "IA 5¢" shall be on the conical portion of a glass or plastic beverage container so that the words are visible from above or shall be on the product label. The placement of refund information solely on the bottom of the beverage container is prohibited.

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

-----X

In the Matter of the Petition of

S. MARTINELLI & COMPANY

Declaratory
Ruling

For A Declaratory Ruling.

-----X

Petitioner, S. Martinelli & Company, ("Martinelli") produces and sells sparkling apple juice and cider. Martinelli seeks a declaratory ruling pursuant to §204 of the State Administrative Procedure Act and 6 NYCRR Part 619, that its products known as "Martinelli's Gold Medal Sparkling Apple Juice" and "Sparkling Cider" are not a "beverage" subject to the redemption requirements of the New York State Returnable Beverage Container Act, L. 1982, Ch. 200, codified as Title 10 of Article 27 of the Environmental Conservation Law ("Act").

Martinelli has voluntarily complied with the Returnable Beverage Container Act by suspending sale of its products in New York State pending this clarification of whether the Act applied to its products. Insofar as the Act is not clear on its face with respect to Martinelli's products, it is in the public interest to grant the petition.

Martinelli's products consist of undiluted apple juice, enriched with the addition of vitamin C and carbonated and pasturized in the bottle. No preservatives are used. No sugars are added. Martinelli's Sparkling Cider won Gold Medals for its quality in competitions around the turn of the century, e.g. in Sacramento in 1890, Buffalo in 1901 and San Francisco in 1914.

It is marketed in a sturdy glass bottle designed much like a champagne bottle in appearance. Martinelli's products are non-alcoholic.

Under the Act, beverage containers for specifically defined beverages are assigned a refund value at the point the product is sold to a consumer. A "beverage" is defined under §27-1003(1) to mean "carbonated soft drinks, mineral water, soda water, beer, and other malt beverages." Martinelli's products are not mineral water, soda water, beer or malt drinks. The question raised in the instant petition is whether or not a carbonated fruit juice is a "carbonated soft drink." For the following reasons, I conclude that Martinelli's products are not a beverage under the Act and may be sold without a refund value and redemption requirement affixed to the beverage container.

New York's Legislature adopted the Act in the wake of a growing volume of beverage container litter. "The Legislature hereby finds that litter composed of discarded soft drink, beer and ale bottles and cans is a growing problem of state concern and a direct threat to the health and safety of the citizens of this State." In attempting to reduce litter and abate increasing solid waste disposal demands on municipalities, the Legislature singled out beer and soft drink containers for regulation.

This determination followed extensive legislative investigation and debate. Beer and soft drink containers were found to be a readily identified and substantial component of the entire litter and solid waste problem. It was a rational and deliberate

choice to regulate these containers. The Legislature may regulate some components of the solid waste and litter problem "without imposing analogous controls on other forms of litter." F. Grad, 1A Treatise on Environmental Law §4.04 (1982 Ed.).

The inclusion of "carbonated soft drinks" as a regulated container must be construed in the usual and commonly understood meaning of that term. McKinney's Statutes §232. The express inclusion of "soft drinks," necessarily leaves unregulated fruit juices, milk products, still and sparkling wines, and other drinks, under the maxim expressio unius est exclusio alterius.

When a fruit juice is carbonated, as here, does it become a "carbonated soft drink" within the terms of the statute? The answer must be found with reference to the purpose of the Act and the intent of the Legislature.

By including only referenced classes of drinks, the Legislature has chosen to adopt a selected approach as the most immediately effective means to abating litter and enhancing solid waste control in New York State as found in §27-1001, ECL. Had the Legislature wished to include fruit juices, whether carbonated as with some mineral waters or still, it could have expressly included that class of beverages among its definitions. Since the Legislature amended the Act in 1983, L. 1983, Ch. 149, and made no effort to revise the definition, it can be assumed that the Legislature intended to limit the scope of beverages. The Act and its amendments also constituted a Temporary State Commission to study the operation of the Act's redemption program and report

to the Legislature by December 1, 1984. Any extension of the coverage of the Act can be addressed by the Commission and the Legislature. The Department of Environmental Conservation chose not to define "carbonated soft drink" further in its regulations, 6 NYCRR Part 367.

Although the legislative history of the Act, including the bill jackets and floor debates*, reveals no express definition of "carbonated soft drink," reference to the use of the term in other statutes reinforces the conclusion of this ruling that a natural fruit juice, carbonated, does not become a "soft drink."

For instance, New York expressly prohibits the sale or distribution of adulterated natural apple juice. Section 204-d, Agriculture and Markets Law. No comparable regulation of artificial soft drinks is found. The State's Alcoholic Beverage Control Law differentiates soft drinks from other beverages when it authorizes brewers to produce "soft drinks and other non-alcoholic beverages." Section 51(7), Alcoholic Beverage Control Law. The Tax Law distinguishes between natural fruit juices, which are a food exempt from sales and use taxes, and "fruit drinks which contain less than seventy percent of natural fruit juice" on the one hand and "soft drinks, sodas and beverages such as are ordinarily

*There is an oblique reference in floor debate to including fruit juice bottles marketed in six-packs, in "glass disposable bottles." New York Senate Stenographic Record, Pauline E. Williman, Certified Shorthand Reporter, May 26, 1982, pp. 3290-3291, but debate later clarified that six packs of fruit juices "wouldn't be prohibited under this bill." Id. at 3308. To the extent it is helpful the legislative debate leads to the conclusion that fruit juice was excluded from the Act.

dispensed at soda fountains" on the other hand. Section 1115(a)(1) Tax Law and 6 NYCRR Part 528.2(b). Thus, the Legislature indicates its recognition that the class of "soft drinks" is a subset of a range of non-alcoholic beverages.

It is elementary that when statutes deal with the same subject they are to be read in pari materia and accorded a consistent interpretation. A fruit juice is not a soft drink as New York's Legislature has chosen to use the term.

New York's usage is in accord with that of other jurisdictions. For instance, one federal court has defined "soft drinks" to be non-alcoholic, non-dairy beverages manufactured for human consumption by the addition of a flavored extract to water and usually carbonated. Bayou Bottling, Inc. v. Dr. Pepper Co., 543 F. Supp. 1255, 1258 (D.C., La.). Originally, the adjective "soft" primarily distinguished such drinks from alcoholic beverages; common usage has evolved to differentiate natural fruit juices from fruit drinks with a reduced percentage of natural juice and additions of colors, artificial flavorings and preservatives. Institutional Food House v. Coble, 221 S. E. 2d 297, 306 (N.C.) The Federal Food & Drug Administration in its requirements & interpretation manual, "Fair Packaging and Labeling Manual," distinguishes cider from a soft drink at 7601: "The commonly accepted definition of 'soft drink' would apply to a fabricated drink rather than a single strength fruit juice." Once a pure fruit juice is diluted, the FDA prohibits reference to it as a juice and defines it as a beverage or drink. 21 CFR §102.33.

The U. S. Environmental Protection Agency in its Solid Waste Management Guidelines for Beverage Containers, 40 CFR Part 244, setting forth the comparable redemption process for federal agencies, defines beverage to mean "carbonated natural or mineral waters; soda water and similar carbonated soft drinks; and beer or other carbonated malt drinks in liquid form and intended for human consumption." 40 CFR §244.101. Since soda water is water charged with a gas like carbon dioxide, the reference to "similar" soft drinks evidently embraces water based drinks rather than effervescent natural fruit juices.

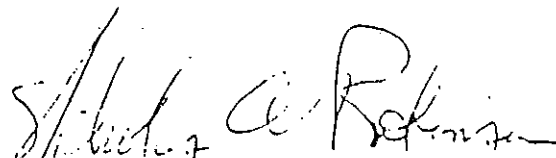
Industry usage is in accord with the differentiation between natural fruit juices and soft drinks. A representative of the National Soft Drink Association, this year defined a "carbonated soft drink" to be "carbonated water with added flavored syrup and edible acid(s)." Bert Dobbs, "Basic Carbonated Beverage Technology," in Proceedings of the Symposium on Beverages; Today's Health Concerns" (Oregon State University, May 17, 1983) at 39. "The most basic ingredient of a soft drink is water which constitutes approximately ninety percent of the beverage." Id. at 40.

Thus, while the Legislature could amend the Act further to provide a definition of soft drink as a term of art, or to include in the Act fruit juices marketed in the same fashion as beer or soft drinks, there is no basis presently to construe "carbonated soft drink" to include natural fruit juices which are carbonated.

Accordingly, Martinelli's Gold Medal Sparkling Apple Juice

and Sparkling Cider are not a beverage as defined in the New York
State Returnable Container Act and are not subject to the Act.

DATED: Albany, New York
October 27, 1983



Nicholas A. Robinson
Deputy Commissioner/General Counsel
New York State Department of
Environmental Conservation